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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ANTONIO DI GIOVANNI, Plaintiff and Appellant, v. DAVID J. OLKKOLA, Defendant and Respondent.	A097393 (Contra Costa County Super. Ct. No. D00-05507)

Antonio Di Giovanni appeals from an order finding respondent David J. Olkkola entitled to attorney fees as the prevailing party under Family Code section 6344 in appellant's action for a restraining order under the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq., hereinafter referred to as the Act).[1] Appellant contends the trial court abused its discretion in awarding attorney fees because it failed to consider appellant's ability to pay as required by section 270, and because the $30,000 in attorney fees awarded is so unreasonable as to shock the conscience. We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts in this case are set forth in this Court's previous opinion on appellant's earlier appeal of the trial court's judgment against him on the merits in *Antonio Di Giovanni v. David J. Olkkola* (June 27, 2002) A095793 [nonpub. opn.]. We restate only those pertinent to this appeal.

At all times relevant herein, appellant was "chief executive officer," "chairman, director and president" of the "Dominion-Life Foundation," a non-profit corporation whose purposes were described by appellant as "to provide charitable, low-cost, advocacy assistance to diagnosed terminally-ill AIDS patients primarily in disputes arising with Social Security, insurance companies, government agencies, hospitals and doctors, landlords and financial institutions." Appellant and respondent first met in 1991, and began living together in 1996. During the approximately five and one-half years they cohabited, their relationship was very volatile.

On October 27, 2000, appellant filed an application and declaration for temporary and permanent restraining orders under the Act, based on several alleged incidents of domestic violence and both physical and verbal abuse by respondent against appellant. Among other things, appellant asked for a restraining order; a stay-away order preventing respondent from approaching within 100 yards of appellant; a residence exclusion order barring respondent from his own home; an order vesting exclusive use, possession and control of respondent's residence in appellant; attorney fees and costs; and an order waiving court fees and costs. In connection with the request for attorney fees and costs, appellant also filed an income and expense declaration stating that he was disabled and had no occupation; his total monthly income was $721 from disability payments, his monthly expenses were $725, and he had no assets. Respondent denied appellant's allegations of abuse, and alleged he had been under appellant's "mental control" since 1996. Respondent described appellant as "a fraud and a cult leader who preys on weak individuals and those who are susceptible to his influence" and alleged that appellant's application for a restraining order was in retaliation for respondent's demands that appellant leave respondent's home and repay the debts appellant owed him.

Following discovery and a change in appellant's counsel, the matter came to hearing on the order to show cause in April 2001. Appellant argued that the basis for the

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1 Unless otherwise indicated, all further unspecified statutory references are to the Family Code.

application for a restraining order was respondent's "uncontrolled temper," "verbal abuse" and "intimidation." In response, respondent argued that as a result of the restraining order, he was barred from going near his own home, of which he was the purchaser and owner, while appellant continued to live there and invite friends to live there with him. On June 1, 2001, after submission of further points and authorities, the trial court issued an order denying appellant's application for a restraining order, based on its finding that appellant had failed to establish that respondent represented a threat of danger to him. Appellant appealed from this order, which we affirmed in our earlier opinion.

On June 27, 2001, respondent filed a motion pursuant to section 6344 for an award of $32,700 in attorney fees as prevailing party. In response, on August 13, 2001, appellant—proceeding at this point in propria persona—filed a 52-page declaration opposing the motion for an award of attorney fees, together with over 100 pages of exhibits. Appellant's submission consisted almost entirely of a lengthy autobiography and history of his relationship with respondent, purportedly in support of his assertions that respondent was not really the prevailing party in the lawsuit because it was on appeal, and that respondent alone was responsible for all the difficulties and expenses incurred in litigating it. Nowhere in his opposition declaration or the attachments thereto did appellant represent that he was financially unable to pay respondent's attorney fees; nor did he present any legal argument or authorities to dispute respondent's right to attorney fees.

Thereafter, appellant sent two letters to the trial court dated September 25 and 27, 2001, stating that he would not be available to attend the hearing on respondent's motion for attorney fees scheduled for October 1, 2001. Although appellant stated that he would be unavailable for 30 days for medical reasons and was requesting a "continuance," he also clearly stated that he was willing to submit the matter on his written opposition, and

that "to benefit the court and counsel for [respondent], I am not adverse to the matter being settled on October 1, 2001 at 08:30 hours in the absence of my person."[2]

The hearing on respondent's motion for fees was held on October 1, 2001. Appellant did not appear at the hearing. After a brief statement by respondent's counsel, the trial court took the matter under submission. By order dated October 9, 2001, the trial court found that respondent was the prevailing party, granted the motion for attorney fees, and awarded fees to respondent in the amount of $30,000 pursuant to section 6344. Appellant did not file any motion for reconsideration of this order. On October 19, 2001, the trial court entered judgment for respondent, denying appellant's petition for a restraining order, dissolving all previous restraining orders, and granting respondent attorney fees in the amount of $30,000, plus costs in the amount of $2,743.22. This appeal followed.

DISCUSSION

Section 6344 of the Act provides as follows: "After notice and a hearing, the court may issue an order for the payment of attorney's fees and costs of the prevailing party." In awarding fees in this case, the trial court found that respondent was the prevailing party under section 6344 and entitled to attorney fees on that basis. On this appeal, appellant contends the trial court abused its discretion by improperly awarding attorney fees to respondent without making a prior determination of appellant's ability to pay pursuant to section 270, and because the amount of attorney fees awarded was so

[2] The wording of this statement differed somewhat in appellant's two letters. The version quoted above is from the letter of September 25, 2001. Two days later, appellant wrote: "[A]s indicated in my original correspondence to the court referenced above, I am not adverse to the matter being settled on October 1, 2001 at 08:30 hours despite my absence. In fact I would almost prefer it." In both letters, appellant styles himself as "His Grace Antonio Di Giovanni," a form of address for appellant found in numerous places in the record.

large as to shock the conscience.[3] Appellant's contentions fail for the elementary reason that they have been waived.

It is well established that a defendant will be precluded from raising an error as a ground of appeal where, by conduct or inaction amounting to acquiescence in the action taken, he or she waives the right to attack it. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002; *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1117; *Wiley* v. *Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 188; *Gimbel* v. *Laramie* (1960) 181 Cal.App.2d 77, 86; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 388, 390-391, 394, pp. 439-442, 444-446.) " 'An appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not, presented to the lower court by some appropriate method. [Citations.]' [Citation.] Failure to object to the ruling or proceeding is the most obvious type of implied waiver. [Citation.]" (*In re Marriage of Hinman, supra,* 55 Cal.App.4th at p. 1002.)[4]

The justification for the rule is simply that it is unfair to the trial judge and unjust to the adverse party to permit a party to raise an alleged error on appeal that could easily have been corrected by the trial court. In the absence of a rule requiring a litigant to

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[3] Section 270 provides: "If a court orders a party to pay attorney's fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay."

[4] The rule that failure to object amounts to a waiver of error has been applied in a large variety of contexts. Thus, the rule has been cited to bar an appellant from raising errors involving pleadings or preliminary proceedings (*Shain* v. *Peterson* (1893) 99 Cal. 486, 487); jury selection or misconduct (*Wiley* v. *Southern Pacific Transportation Co., supra,* 220 Cal.App.3d at p. 188); the admission of evidence (*Gimbel* v. *Laramie, supra,* 181 Cal.App.2d at p. 86; *Cummings* v. *Cummings* (1929) 97 Cal.App. 144, 149); expert witness qualifications or credibility (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 366-367); judicial misconduct (*Sabella* v. *Southern Pac. Co.* (1969) 70 Cal.2d 311, 319); defective rulings or failures to rule (*Cushman* v. *Cushman* (1960) 178 Cal.App.2d 492, 498; *Rosenthal* v. *Harris Motor Co.* (1953) 118 Cal.App.2d 403, 408); and argument (*Sabella* v. *Southern Pac. Co., supra,* 70 Cal.2d at p. 319). The duty to object applies equally to parties appearing in propria persona as to those

object to asserted errors in the trial court before raising them on appeal, both the adverse party and the trial court itself would be deprived of any opportunity to cure the defect during trial, while the appellant would be permitted to gamble that if he did not secure a favorable final outcome in the trial court, he could still raise the error on appeal and prevail there. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; *Sommer v. Martin* (1921) 55 Cal.App. 603, 610; 9 Witkin, Cal. Procedure, *supra,* Appeal, § 394, pp. 444-446.)[5] Therefore, the initial question to be determined when a party complains of asserted error for the first time on appeal is whether a timely objection and admonition or other action by the trial court would have cured the harm. If it would, the contention must be rejected.

At no point did appellant raise or argue to the trial court either of the issues he now seeks to raise on this appeal. Although it would have been simple for appellant to have argued to the trial court pursuant to section 270 that he was financially unable to pay the amount of attorney fees respondent was requesting under section 6344, and to have asked the trial court to deny respondent's request on that basis, appellant never did so. Instead, appellant simply reargued the substantive issues already decided against him on his application for a restraining order, notified the trial court that he would not attend

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represented by counsel. (*People* v. *Chessman* (1951) 38 Cal.2d 166, 178, overruled on other grounds in *People v. Daniels* (1969) 71 Cal.2d 1119, 1139.)

[5] " 'Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence. In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of appeal.' [Citation.]" (*Sommer v. Martin, supra,* 55 Cal.App. at p. 610.)

the hearing on respondent's motion for attorney fees, and then consented to the trial court hearing and deciding the motion in his absence.[6]

There is no merit to appellant's assertion that his income and expense declaration provided the trial court with sufficient evidence to determine he was unable to pay respondent's requested attorney fees. The income and expense declaration was filed at the very outset of appellant's action in October 2000, almost exactly a full year before the hearing on respondent's request for attorney fees held on October 1, 2001. Because of its limited procedural purpose, it was never subject to objection, or to the level of scrutiny necessary to verify its accuracy. Thereafter, it remained just one document in the record, arguably contradicted by other conflicting evidence admitted regarding appellant's financial interests in and control of his Dominion Life Foundation business. Unlike a dissolution action, in this domestic violence litigation between two cohabitants there was no discovery of the parties' financial means. Because he had not had any opportunity to conduct discovery into appellant's financial means and assets, respondent was not in a good position to prove appellant's ability to pay the attorney fees. By the same token, neither was respondent in any position to rebut a claim of financial inability to pay fees, had appellant actually made such a assertion. This salient fact amply demonstrates the policy reasons for the waiver rule and the equitable grounds for applying it in this case, in which appellant did not even attend the noticed hearing on respondent's request for attorney's fees, much less bring the issue of his alleged financial inability to pay to the trial court's attention.

On this record, we conclude that appellant has waived the issues he purports to raise for this first time on this appeal. It would be unfair to the trial court and to

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[6] Appellant's opposition declaration did assert that respondent's vigorous litigation of the restraining order resulted in "escalating costs unnecessarily," and stated that "[i]t is only because of domestic violence organizations, victim's organizations, patients, family, friends, ex-patients of Olkkola, ex-friends of Olkkola, and the church that I was able to pay the better part of my legal expenses." This generalized assertion was too unspecific to constitute a claim of inability to pay respondent's attorney fees, much less a request that the trial court make a determination of that issue pursuant to section 270 without the benefit of any evidentiary inquiry into appellant's financial means and assets.

respondent to permit appellant now on appeal to take advantage of alleged errors which could easily have been avoided had appellant raised them to the trial court at the time of its consideration of respondent's motion for attorney fees. (*Doers v. Golden Gate Bridge etc. Dist., supra,* 23 Cal.3d at pp. 184-185, fn. 1; *In re Marriage of Hinman, supra,* 55 Cal.App.4th at p. 1002.)

DISPOSITION

Upon our review of the entire record, we conclude that appellant has waived any claim that the amount of attorney fees requested was so large as to shock the conscience, or that the trial court erred in failing to make a determination of appellant's ability to pay respondent's attorney fees pursuant to section 270. There was no abuse of discretion or miscarriage of justice in the trial court's grant of respondent's motion for an award of attorney fees pursuant to section 6344. We therefore affirm the judgment and order from which appellant appeals.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Pollak, J.